Supreme Court, U.S.
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No. 99 894

IN THE

Supreme Court of the United States

BANK OF AMERICA CORPORATION;
BANK OF AMERICA, N.A.,

Petitioners,

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; SHIRLEY WILCHER, DEPUTY ASSISTANT SECRETARY FOR FEDERAL CONTRACTOR COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; JEROME GEATHERS, DISTRICT DIRECTOR FOR OFFICE OF FEDERAL CONTRACT COMPLIANCE, CHARLOTTE DISTRICT OFFICE; ALICE A. WEBSTER, DISTRICT DIRECTOR FOR OFFICE OF FEDERAL CONTRACT COMPLIANCE, JACKSONVILLE DISTRICT OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When the Government has conducted an unconstitutional search of a federal contractor's facilities, and the federal contractor has petitioned a United States district court to remedy that constitutional violation, can the Government wrest the action from the district court and thereby deprive the federal contractor of a complete remedy simply by filing an eleventh-hour administrative complaint and demanding that the district court dismiss the action?

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption of this case. NationsBank Corporation, NationsBank, N.A., and NationsBank of Florida, N.A. were plaintiffs-appellees before the district court and the court of appeals. Subsequent thereto, NationsBank of Florida, N.A., merged into NationsBank, N.A., after which NationsBank, N.A. merged into Bank of America, N.A. and NationsBank Corporation merged into Bank of America Corporation.

Petitioner Bank of America, N.A. is wholly-owned by Petitioner Bank of America Corporation. Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock. Petitioners Bank of America, N.A. and Bank of America Corporation are collectively referred to herein as "Bank of America".

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CITATIONS OF OPINIONS AND ORDERS BELOW

The Fourth Circuit reversed the district court in *NationsBank Corp. v. Herman*, 174 F.3d 424 (4th Cir. 1999). Both the district court's orders and opinions and the Fourth Circuit's denial of Bank of America's petition for rehearing are unpublished. All have been included in the Appendix.

STATEMENT OF JURISDICTION

On April 6, 1999, the Fourth Circuit reversed the district court. On June 3, 1999, the Fourth Circuit denied Bank of America's petition for rehearing. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the court of appeals' opinion and decision on Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES & REGULATIONS INVOLVED IN THE CASE

Pursuant to Rule 14.1(f) of the Rules of the Supreme Court of the United States ("Supreme Court Rules"), the following constitutional provisions, statutes and regulations are involved in this case:

1. The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Constitution of the United States, Amend. IV

2. Executive Order 11246, see Appendix ("App.") at 25a-43a; and

3. 41 C.F.R. §§ 60-1, *et seq.*

STATEMENT OF THE CASE

The Office of Federal Contractor Compliance Programs ("OFCCP" or "the Government") imposes affirmative-action obligations upon federal contractors by regulation. *See* 41 C.F.R. §§ 60-1, *et seq.* On November 24, 1993, the OFCCP notified Bank of America that it had selected Bank of America's Charlotte, North Carolina facility for a review of its compliance with the OFCCP's affirmative-action regulations. Bank of America submitted to the review.[1]

Shortly thereafter, however, the OFCCP also notified Bank of America that it had selected its facilities in Columbia, South Carolina and Tampa, Florida for additional compliance reviews. Bank of America grew suspicious of the OFCCP's decisions to review so many of its facilities in

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1. The Government has asserted throughout these proceedings that Bank of America consented to the search and, therefore, waived its right to contest the Government's unconstitutional search. Contrary to the Government's contention, however, a federal contractor who denies the OFCCP access to its books and records risks debarment from federal contracts and its voluntary cooperation does not equate to blanket consent to the OFCCP's search. The OFCCP must comply with its own established selection criteria and a contractor's "consent" to the search may be withdrawn once the contractor has a reasonable basis to conclude that its selection may have been inconsistent with those criteria. *See United States v. Leary*, 846 F.2d 592, 598 & n.9 (10th Cir. 1988).

a short period of time.[2] Coupled with indications that the OFCCP had articulated false reasons for the selections, Bank of America came to believe that the OFCCP failed to base its selections on an unbiased application of specific, neutral criteria contained in an administrative plan, as constitutionally required.

On March 1, 1995, Bank of America, therefore, filed suit, alleging that the OFCCP's selections of the Columbia and Tampa facilities violated the Fourth Amendment. Bank of America asked the district court to declare that the OFCCP had violated its constitutional rights, to enjoin any further violations of Bank of America's constitutional rights, and to award any other relief the district court deemed appropriate.

Discovery in the district court revealed significant evidence of the OFCCP's internally inconsistent, contradictory, ad hoc, and constitutionally-suspect explanations for its selections.[3] Based on Bank of America's discovery regarding the OFCCP's constitutionally-suspect selections of Charlotte as well as Tampa and Columbia, the

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2. At the time of the Charlotte selection Bank of America also was undergoing a review of its Nashville, Tennessee facility.

3. After the district court refused to dismiss Bank of America's constitutional claims regarding the OFCCP's selection of Tampa and Columbia, the OFCCP abruptly withdrew the Tampa and Columbia compliance review notices. As the district court noted, "the timing of all this [was] very interesting. . . ." (App. at 16a). When Bank of America began to assert constitutional issues and constitutional protections, "[a]ll of a sudden, two claims, two matters that OFCCP [had] cranked up and noticed out regarding Tampa and Columbia [were] all of a sudden dropped." (App. at 16a).

district court permitted Bank of America on February 25, 1997 to amend its Complaint to challenge the constitutionality of the OFCCP's selection of its Charlotte facility. The litigation on this claim progressed for several months.

On July 18, 1997, however, nearly five months after Bank of America filed its Amended Complaint in the district court and more than two years after Bank of America filed its original Complaint, the OFCCP filed an administrative action against Bank of America, alleging that it had failed to comply with Executive Order 11246. The OFCCP initially concluded as much on June 29, 1995, but waited more than two years before filing an enforcement action against Bank of America.

Insisting that Bank of America could assert the OFCCP's constitutional violations as a defense to its administrative complaint, the OFCCP moved for summary judgment against Bank of America's constitutional claims the very next business day, arguing that Bank of America "failed" to exhaust its remedies in the suddenly-pending administrative action. In response, Bank of America asked the district court to enjoin the eleventh-hour administrative proceedings until the district court finished its nearly-completed adjudication on the constitutionality of the Government's search.

Ruling on the competing motions, the district court determined that Bank of America showed

> considerable evidence of foreordained selection [of Bank of America] by the OFCCP with post hoc justification [and that] there is a lot of evidence there that there is no criteria, no neutral

> criteria. The evidence . . . is strongly suggestive of no neutral criteria and the type of purely discretionary, *i.e.* arbitrary governmental action in selecting [Bank of America]. . . .

(App. at 18a). Mindful of the "very strong" public interest "in requiring that governmental agencies conform their actions to the Constitution" the district court observed that the OFCCP "must be held to conform their actions to the law, because arbitrary action by any such agencies" destroys public support for the law. (App. at 18a-19a).

Consequently, on November 17, 1997, the district court refused to give the OFCCP "carte blanche to file administrative complaints and oust the Court of jurisdiction" over the long-pending, purely constitutional question regarding the OFCCP's selection of the Charlotte facility. (App. at 18a). The district court denied the OFCCP's motion for summary judgment, stayed the OFCCP's new administrative proceedings pending final adjudication of the constitutional question, and set the matter for trial on February 23, 1998 to resolve the constitutional issue. (App. at 19a & 21a-22a).

On January 16, 1998, approximately one month prior to trial, the OFCCP filed an interlocutory appeal from the denial of summary judgment and temporary stay of the administrative proceedings pending adjudication of Bank of America's constitutional claim. According to the OFCCP, the district court should have dismissed the nearly-completed judicial proceedings in favor of the OFCCP's suddenly-filed administrative action.

The Fourth Circuit agreed. Reversing the district court, the Fourth Circuit concluded that Bank of America "must exhaust administrative remedies before initiating federal suit." (App. at 7a). Based on this conclusion, the Fourth Circuit thought that the district court should have dismissed the ongoing judicial proceedings immediately upon the OFCCP's commencement of administrative proceedings. Thus, the Fourth Circuit granted summary judgment to the OFCCP and vacated the district court's stay of the administrative proceedings. (App. at 13a).

Bank of America filed a Petition for Rehearing and for En Banc Review. On June 3, 1999, the court of appeals denied Bank of America's Petition. (App. at 23a-24a).

SUMMARY OF ARGUMENT

This Court's precedents reject exhaustion of administrative remedies as a defense to an action in federal court for relief from the Government's violations of constitutional rights, especially when those administrative remedies are inadequate. The Fourth Circuit simply ignored these precedents in holding that Bank of America should have exhausted its administrative remedies prior to petitioning in federal court. Indeed, at the time Bank of America petitioned the district court for relief and for many months thereafter, there were *no* administrative proceedings in which Bank of America could participate. And even now that there is such a proceeding, the administrative "remedies" available to Bank of America for the Government's unconstitutional acts are inadequate. For these reasons, the Court should review the decision below.

REASONS FOR GRANTING THE WRIT

Bank of America sought relief in an Article III court from the OFCCP's violations of its Fourth Amendment rights. District courts are permitted to give such relief from governmental actors' constitutional violations. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971); *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773 (1946). *See also* 42 U.S.C. § 1983. Specifically, Bank of America asked the district court to declare that the OFCCP unconstitutionally searched Bank of America's facilities in violation of the Fourth Amendment, to enjoin the OFCCP from violating again Bank of America's Fourth Amendment rights, and to award other relief deemed appropriate by the district court. The OFCCP has never challenged, because there is no doubt, that Bank of America has the right to seek such relief from an Article III court.[4]

But to end run Bank of America's constitutional claim after unconvincingly litigating it in the district court for months, the OFCCP suddenly filed an administrative complaint against Bank of America alleging regulatory violations and argued that: (1) Bank of America could assert the Fourth Amendment violations as a defense to the OFCCP's complaint in the administrative proceedings; and (2) the possibility of administrative "relief" mandated that the district court enter summary judgment dismissing Bank of America's long-pending constitutional claims against the OFCCP.

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4. Indeed, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Bivens*, 403 U.S. at 407, 91 S. Ct. at 2010 (Harlan, J., concurring).

Both the premise and the conclusion of the OFCCP's argument are wrong, however, and the court of appeals' acceptance of them reflects a failure to apply this Court's precedent. Most centrally, this Court has largely rejected exhaustion of administrative remedies as a defense to constitutional torts asserted against state and federal governments. *See McCarthy v. Madigan*, 503 U.S. 140, 112 S. Ct. 1081 (1992); *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S. Ct. 2557 (1982). Indeed, the very point of permitting actions against the Government for violating citizens' constitutional rights is to "throw open the doors of the United States courts' to individuals . . . who had suffered the deprivation of constitutional rights, and to provide these individuals immediate access to the federal courts. . . ." *Patsy*, 457 U.S. at 504, 102 S. Ct. at 2561 (internal citations omitted). Thus, the court of appeals' crucial assumption that administrative exhaustion is presumptively required contradict this Court's clear precedent. This alone warrants a Writ of Certiorari.

Moreover, when Bank of America petitioned the district court for relief from the constitutional injury the OFCCP had inflicted upon it, and indeed for many months thereafter as this action progressed, there were *no* administrative remedies for Bank of America to exhaust. A federal contractor has no right to begin an administrative proceeding against the OFCCP, and the OFCCP itself waited more than two years to commence any administrative proceedings against Bank of America. Thus, the district court was the *only* forum in which Bank of America could seek *any* remedy for the Government's constitutional violations, let alone the remedies a federal district court can provide. Consequently, the court of appeals' ultimate holding that Bank of America "must exhaust administrative remedies before initiating

federal suit," (App. at 7a), missed the simple point that Bank of America had no such remedy to exhaust when it sought relief in the district court.[5]

But even forgetting that Bank of America could not seek relief in administrative proceedings unless and until the OFCCP saw fit to commence them, the only administrative "remedy" available to Bank of America now that the OFCCP has commenced administrative proceedings is the possible exclusion of the unconstitutionally-obtained evidence from the administrative proceedings against Bank of America. According to the Fourth Circuit, this possible "remedy" requires dismissal of Bank of America's constitutional claims in favor of the administrative proceedings. But this Court's precedent provides otherwise.

Although Congress may enact an extremely comprehensive, "elaborate remedial scheme" that can render a direct constitutional claim against the Government unnecessary, see *Schweiker v. Chilicky*, 487 U.S. 412, 108 S. Ct. 2460 (1988), neither the principle of exhaustion of remedies nor the availability of an alternative remedy will bar such an action "if that pathway would be futile, unduly burdensome, or provide insufficient relief." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 3d* § 3655 (1998).[6]

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5. *Cf. Bivens*, 403 U.S. at 400, 91 S. Ct. at 2006 (Harlan, J. concurring) (rejecting notion that citizen's ability to petition the federal judiciary for violation of Fourth Amendment rights "depends on a decision by the State in which he resides to accord him a remedy").

6. *See also Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773, 67 S. Ct. 1493, 1503 (1947) (observing that presence of (Cont'd)

Here, even assuming an administrative law judge ("ALJ") would exclude unconstitutionally-obtained evidence in the OFCCP's administrative proceedings against Bank of America, that is a very different and much lesser remedy than those Bank of America sought in petitioning the district court for relief from the Government's violations of Bank of America's constitutional rights.[7] Bank of America asked the district court to declare that the OFCCP violated its Fourth Amendment rights, to enjoin the OFCCP from doing so again, and to award other relief the court deemed appropriate. The OFCCP's administrative process offers Bank of America *none* of these remedies. The ALJ assigned to the OFCCP's administrative complaint against Bank of America cannot exercise Article III power granted to district courts by 28 U.S.C. § 2201 to declare an act unconstitutional. The ALJ has no equitable power to enjoin the OFCCP from violating again Bank of America's rights. Nor does the ALJ have the district court's power to award other relief deemed

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(Cont'd)
constitutional questions and inadequacy of prescribed administrative relief is "sufficient to dispense with exhausting the administrative process before instituting judicial intervention"); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196, 203, 44 S. Ct. 553, 556 (1924) (holding that federal court may exercise equitable jurisdiction where there is an inadequate state remedy to correct a constitutional wrong); *Wallace v. Hines*, 253 U.S. 66, 40 S. Ct. 435 (1920) (same).

7. Indeed, although this Court has debated whether alternative remedies vitiate the need for an exclusionary rule, compare *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1045, 104 S. Ct. 3479, 3486 (1984); *California v. Minjares*, 443 U.S. 916, 925, 100 S. Ct. 9, 14 (1979) (Rehnquist, J., dissenting) with *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961); *Lopez-Mendoza*, 468 U.S. at 1052, 104 S. Ct. at 3490 (White, J., dissenting), the unquestioned foundation of that debate is that such remedies are in fact *different*.

appropriate, such as monetary damages or attorneys' fees, all of which the district court may award in Bank of America's lawsuit. *See Bivens*, 403 U.S. 388, 91 S. Ct. at 1999 (money damages); 28 U.S.C. § 2412 (attorneys' fees).

Thus, even if the ALJ is "competent to adjudicate the issue" of whether the OFCCP violated Bank of America's constitutional rights, the Fourth Circuit wrongly required exhaustion, because the ALJ lacks authority to grant the type of relief requested. *McCarthy*, 503 U.S. at 148, 112 S. Ct. at 1081; *see also McNeese v. Board of Ed. for Community Unit School Dist. 187*, 373 U.S. 668, 675, 83 S. Ct. 1433 (1963). Even if Bank of America is successful in the administrative forum, the limitation on administrative remedies will require further litigation in the district court to obtain complete relief. Thus, exhaustion of administrative remedies is futile. The court of appeals' failure to recognize this fundamental principle balancing the roles of the executive and judicial branches warrants this Court's review and correction.

CONCLUSION

In the final analysis, the court of appeals incorrectly equated Bank of America's defensive use of an administrative exclusionary rule with the affirmative relief sought in Bank of America's action in the district court. This error flowed directly from the Fourth Circuit's failure to apply this Court's clear precedent. And, as the Fourth Circuit acknowledged, its decision to require exhaustion motivated both its judgment to grant the OFCCP summary judgment and to vacate the district court's stay of the new administrative proceedings against Bank of America. (App. at 1a-13a). This Court should grant a Writ of Certiorari to review the extent of the OFCCP's ability to strip the federal judiciary of jurisdiction over a citizen's ongoing constitutional claims against it. *See* Supreme Court Rule 10(c).

Based on the foregoing, Bank of America respectfully requests that the Court grant its Petition for Writ of Certiorari and review the question presented herein.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED APRIL 6, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1127

NATIONSBANK CORPORATION; NATIONSBANK, N.A.; NATIONSBANK OF FLORIDA, N.A.,

Plaintiffs-Appellees,

v.

ALEXIS M. HERMAN, Secretary of Labor, United States Department of Labor; SHIRLEY WILCHER, Deputy Assistant Secretary for Federal Contract Compliance Programs, United States Department of Labor; CAROL A. GAUDIN, Regional Director of Office of Federal Contract Compliance Region IV; JEROME GEATHERS, District Director for Office of Federal Contract Compliance, Charlotte District Office; ALICE A. WEBSTER, District Director for Office of Federal Contract Compliance, Jacksonville District Office,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, Chief District Judge.
(CA-95-103-3-MU)

Appendix A

Argued: January 27, 1999

Decided: April 6, 1999

Before ERVIN, LUTTIG, and KING, Circuit Judges.

Vacated and reversed by published opinion. Judge Luttig wrote the opinion, which Judge Ervin and Judge King joined.

* * *

OPINION

LUTTIG, Circuit Judge:

NationsBank and its subsidiaries ("NationsBank") brought this suit against the Secretary of Labor and officials of the Department of Labor's Office of Federal Contract Compliance Programs (collectively "OFCCP") to challenge the constitutionality of the OFCCP's selection of certain NationsBank offices for compliance review under federal affirmative action requirements. The OFCCP appeals the district court's denial of summary judgment and grant of a preliminary injunction staying its administrative enforcement proceeding against NationsBank. Because NationsBank must exhaust administrative remedies before initiating federal suit, we reverse the district court's denial of summary judgment and vacate the preliminary injunction.

Appendix A

I.

Appellee NationsBank is a federal contractor and thus subject to Executive Order 11246, which mandates race- and sex-based affirmative action in employment. In 1993, the OFCCP, which has responsibility for enforcing this Order, initiated a compliance review of a NationsBank office in Charlotte, North Carolina, including inspection of documents and an onsite investigation. NationsBank did not object to this review. In October 1994, the OFCCP informed NationsBank that it had found violations of the Executive Order, based chiefly on NationsBank's disproportionate rejection of minority applicants. The following June, it sent NationsBank a proposed "Conciliation Agreement" providing for, among other things, backpay to rejected minority applicants, "[a]ffirmative action goals" (with pay of executives and managers tied to their success in satisfying those goals), and various programs to ensure the promotion of minorities and women "into underrepresented areas."

Soon after informing NationsBank of the alleged violations in the Charlotte office, the OFCCP decided to initiate additional compliance reviews at NationsBank offices in Tampa, Florida, and Columbia, South Carolina. This time, however, NationsBank objected, refusing to cooperate unless the OFCCP informed the bank of what criteria it had used in selecting these two new sites. When the OFCCP failed to do so, NationsBank brought this action for declaratory and injunctive relief in the District Court for the Western District of North Carolina, alleging that the OFCCP's selection of the Tampa and Columbia offices for review (and thus for the searches incident to such a review) was unreasonable, in

violation of the Fourth Amendment, because the OFCCP had not acted pursuant to neutral selection criteria but instead had singled out NationsBank. The OFCCP then brought a motion to dismiss for failure to exhaust administrative remedies, which the court denied in January 1996. Three months later, the OFCCP, in the words of the district court, "all of a sudden dropped" its plans to review the Tampa and Columbia offices.

At about this time, in March 1996, efforts to agree on a conciliation plan regarding the Charlotte office failed. In February 1997, NationsBank, in response to what it had learned in pursuing its suit regarding the OFCCP's selection of the Tampa and Columbia offices, amended its complaint to add Fourth Amendment objections to the OFCCP's selection of Charlotte. On July 18, 1997, a year and a half after conciliation efforts had failed, the OFCCP brought a formal complaint against the Charlotte office. The next business day, July 21, it moved for summary judgment against NationsBank for failure to exhaust remedies in the suddenly pending administrative action. NationsBank, in response, moved for a preliminary injunction staying the administrative action pending a final decision from the district court.

The district court ruled in NationsBank's favor in late 1997, denying the OFCCP's motion for summary judgment and granting NationsBank's motion for a preliminary injunction. The OFCCP then brought this interlocutory appeal of both rulings.

II.

Initially, NationsBank challenges our authority to hear the OFCCP's appeal, arguing that we lack jurisdiction to review either the grant of the preliminary injunction or the denial of summary judgment. We disagree, holding that we have jurisdiction to review both rulings on interlocutory appeal.

As to our jurisdiction to hear the appeal of the preliminary injunction, NationsBank's argument borders on the frivolous. Title 28, section 1292(a)(1), of the United State Code grants appellate jurisdiction over "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." The district court entered an interlocutory order granting an injunction. The OFCCP, therefore, may appeal this order immediately.[1]

As to the OFCCP's appeal from the denial of summary judgment, even though we do not normally hear such interlocutory appeals, we may exercise jurisdiction in this case because the denial of summary judgment is "intimately bound up with" the grant of the preliminary injunction. *See*

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1. NationsBank relies upon *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), to argue that a court of appeals should only exercise jurisdiction under section 1292(a)(1) when the injunction is "of serious, perhaps irreparable, consequence." But in *Carson*, the Court set forth the standard governing appeals of interlocutory orders that have effects similar to those of injunctions, but that technically are not injunctions. *See Carson*, 450 U.S. at 83-84. When, instead, a trial court enters an actual injunction, as in this case, *Carson* is inapplicable, and section 1292(a)(1) applies directly.

Fran Welch Real Estate Sales, Inc. v. *Seabrook Island Co.*, 809 F.2d 1030, 1032 (4th Cir. 1987) (reviewing grant of partial summary judgment on appeal under section 1292(a)(1) because it "was intimately bound up with" denial of injunction). In order to exercise our statutory mandate to hear the OFCCP's interlocutory appeal of the preliminary injunction, we must resolve the question of whether NationsBank is required to exhaust administrative remedies before suing. For if NationsBank must exhaust (as we conclude below), the preliminary injunction was improper. NationsBank would have no likelihood of prevailing on the merits of the present suit (even if it might prevail on an appeal from an administrative ruling or in an action for damages), since a party cannot prevail on the merits of a suit that it does not (yet) have the right to bring. *See Guerra* v. *Scruggs*, 942 F.2d 270, 277 (4th Cir. 1991) (explaining reversal of injunction against discharge of army officer by noting that "Guerra has no likelihood of success on the merits of his case because he has failed to exhaust his administrative remedies"). Additionally, if NationsBank must exhaust, the harm to the OFCCP from an injunction staying its administrative proceeding — in having its enforcement processes short-circuited by a lawsuit — would be much greater than the district court believed. This issue of exhaustion, on which the propriety of the injunction turns, is likewise the sole issue on which the denial of summary judgment turns. Therefore, under *Fran Welch*, we have jurisdiction to review the denial of summary judgment along with our review of the injunction.

NationsBank relies on *Swint* v. *Chambers County Comm'n*, 514 U.S. 35 (1995), to argue that we lack jurisdiction over

the denial of summary judgment. This argument, however, fails. The Court in *Swint* held that there was no jurisdiction over an appeal by a defendant (a county commission) from a denial of summary judgment, even though there was jurisdiction to hear the interlocutory appeal of individual co-defendants from a denial of qualified immunity. That decision is readily distinguishable. First, it chiefly involved not section 1292(a)(1)'s grant of jurisdiction over interlocutory appeals involving injunctions, but rather the final judgment rule of 28 U.S.C. § 1291 and the scope of the court-created collateral-order exception to it. Second, in *Swint* the denial of summary judgment to the county commission was not "inextricably intertwined" with the appealable ruling on qualified immunity, nor was "review of the former decision [ ] necessary to ensure meaningful review of the latter." *Swint*, 514 U.S. at 50-51. Here, by contrast, the denial of summary judgment is, as explained above, "inextricably intertwined" with the grant of the preliminary injunction, and jurisdiction is thus appropriate.

III.

Turning to the merits of the appeal, we conclude that under our decisions in *Volvo GM Heavy Truck Corp.* v. *Department of Labor*, 118 F.3d 205 (4th Cir. 1997), and *Thetford Properties IV L.P.* v. *Department of Housing & Urban Dev.*, 907 F.2d 445 (4th Cir. 1990), NationsBank must exhaust administrative remedies before bringing its Fourth Amendment suit against the OFCCP. Therefore, the district court erred both in denying the OFCCP summary judgment and in enjoining the office's administrative proceedings against NationsBank. Because both rulings turn on the legal

issue of whether NationsBank must exhaust, our review is *de novo*. *See Virginia Carolina Tools, Inc.* v. *International Tool Supply, Inc.*, 984 F.2d 113, 116 (4th Cir. 1993) (explaining that review of decision regarding injunction is *de novo* when propriety of that decision rests solely on a legal question).

Where Congress has intended to require administrative exhaustion prior to any judicial challenges to an agency's enforcement of a law or regulation, courts enforce that requirement unless a party provides grounds for waiving it in a particular case. *See McCarthy* v. *Madigan*, 503 U.S. 140, 144-48 (1992); *Volvo GM*, 118 F.3d at 211-12. As to Executive Order 11246, Congress has clearly required exhaustion, as we have explicitly held: "Congress by granting the President authority to issue 'policies and directives' to carry out implementation of Executive Order 11246 by the agencies, did speak 'clearly' in requiring exhaustion." *Volvo GM*, 118 F.3d at 211. Therefore, NationsBank must exhaust unless it can show grounds for waiver.

NationsBank raises two arguments for waiver, neither of which is availing. First, it argues that constitutional claims, particularly its own, are unsuited for administrative exhaustion. Second, it argues that the OFCCP's questionable behavior, which so aroused the district court's suspicion, also justifies waiver.

NationsBank's first argument fails under our consistent and unambiguous line of cases rejecting the contention that constitutional claims should be exempt from exhaustion requirements. *See Volvo GM*, 118 F.3d at 215 (requiring

exhaustion of claim that the OFCCP's enforcement proceedings and delay both violated due process, and noting that "[t]he Fourth Circuit has recognized that exhaustion can be useful even where a constitutional issue is presented"); *Thetford*, 907 F.2d at 448 (holding, in challenge to constitutionality of statute that agency enforced, that "we must reject appellant's argument that,as a general rule, exhaustion is not necessary where administrative litigants raise constitutional challenges"); *Guerra*, 942 F.2d at 276 ("The doctrine of requiring exhaustion . . . applies to cases like the present one where constitutional claims are made."). *Cf. American Federation of Gov't Employees* v. *Nimmo*, 711 F.2d 28, 31 (4th Cir. 1983) ("[E]xhaustion is particularly appropriate when the administrative remedy may eliminate the necessity of deciding constitutional questions."). We have also rejected the related argument that the bureaucratic burden on a party from having to exhaust administrative remedies before suing justifies waiver when a constitutional claim is at issue. *See Volvo GM*, 118 F.3d at 213 ("Such a burden has been found to be wholly insufficient to warrant a waiver of the exhaustion requirement."). *Cf. Thetford*, 907 F.2d at 449 (rejecting argument that "submission to the administrative process is part of the alleged due process violation," because adequacy of enforcement procedure was separate issue from constitutionality of statute being challenged).

NationsBank makes several efforts, none convincing, to circumvent this considerable caselaw. It first attempts to define narrowly the congressional intent relevant to exhaustion, contending that "Congress never has mandated . . . exhaustion . . . where the *constitutionality* of the

government's action is at issue." Appellees' Br. at 42 (emphasis added). Even if this were the correct way to frame the issue, NationsBank's argument is contrary to *Volvo GM*, in which we held that Congress had mandated exhaustion even of the plaintiff's challenge to the constitutionality of the government's action — the OFCCP's seven-year delay in bringing an enforcement action. *See* 118 F.3d at 214-15. *Cf. McCarthy*, 503 U.S. at 145 ("Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power . . . .").

Next, NationsBank argues, in agreement with the district court, that *Volvo GM* does not govern this case because that case really only involved a claim under the Administrative Procedure Act, the due process claim being merely a repackaged version of the APA claim. NationsBank points to our observation, in a passing footnote, that the plaintiff's constitutional claim "appears to be nothing more than clever pleading of its APA claim." *Volvo GM*, 118 F.3d at 212 n.10. But *Volvo GM* separately and extensively treated the constitutional claim both in evaluating congressional intent, *id.* at 210-11, and in determining whether to waive the exhaustion requirement, *id.* at 214-15. NationsBank, citing only to the footnote, ignores all of this analysis.

NationsBank finally argues that requiring it to submit to an enforcement proceeding based on illegally obtained evidence is itself an actionable constitutional wrong. In this contention, too, NationsBank is mistaken, as the Supreme Court reconfirmed as recently as last year. *See Pennsylvania Bd. of Probation and Parole* v. *Scott*, 118 S. Ct. 2014, 2019 (1998) ("We have emphasized repeatedly that the State's use

of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. . . . Rather, a Fourth Amendment violation is fully accomplished by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can cure the invasion of the defendant's rights which he has already suffered.") (quotation omitted).[2]

Second, in addition to its argument that we should waive the exhaustion requirement for constitutional claims, NationsBank also argues that the OFCCP's questionable behavior warrants waiver. In so arguing, NationsBank relies heavily on the district court's concerns about the OFCCP's selection policies (or lack thereof) and conduct toward NationsBank. *See* J.A. at 276 (refusing to require exhaustion, in part because the OFCCP's timing in halting the reviews of the Tampa and Columbia offices and in instigating the enforcement proceeding against the Charlotte office, which it then used as the basis for its motion for summary judgment, was "very interesting" and "highly intriguing," suggesting efforts "to avoid review whatsoever"); *id.* at 279 (finding "considerable evidence of foreordained selection" and of "arbitrary governmental action in selecting people"); *id.* at 253 (suggesting that the OFCCP is "an organization which seeks to, shall we say, maximize its flexibility in the selection process").

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2. NationsBank itself seemed aware of this at oral argument, admitting that the absence of an exclusionary rule in the administrative proceeding would not establish irreparable harm under the test for preliminary injunctions.

But whatever the merits of NationsBank's Fourth Amendment claim, mere agency misbehavior does not justify waiver. *See Volvo GM*, 118 F.3d at 215 n.14 (requiring exhaustion notwithstanding court's "frustration" over the OFCCP's "unsettling" delay in bringing enforcement proceedings). Rather, a party must make a "clear showing" that an adverse ruling from the agency is "a certainty." *Thetford*, 907 F.2d at 450. NationsBank has not made such a showing.[3] If, as NationsBank alleges and the district court suspected, the OFCCP did single out NationsBank for investigation and either has no policy governing its selection of targets for compliance review or has one but intentionally disregarded it, exhaustion would serve the frequently noted purpose of allowing the agency to correct its mistakes before facing judicial review. *See, e.g.*, *McCarthy*, 503 U.S. at 145 ("[A]n agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.").[4]

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3. NationsBank has raised its Fourth Amendment objection as a defense in the administrative action.

4. The district court also thought that the heavily factual nature of a Fourth Amendment claim counseled against exhaustion. But our case law points in exactly the opposite direction. *See Volvo GM*, 118 F.3d at 212 (agreeing with the OFCCP that claims against it "will involve a 'fact-specific assessment that cannot be undertaken until the administrative process is completed' "); *id.* at 214 (same); *id.* at 215 (same); *Thetford*, 907 F.2d at 448 (noting "the readily apparent benefits" to a reviewing court of having both "a fully developed administrative record" and the agency's application and interpretation of its regulations and governing law).

Appendix A

CONCLUSION

Since NationsBank must exhaust administrative remedies before bringing suit against the OFCCP, the grant of the preliminary injunction to NationsBank and the denial of summary judgment to the OFCCP were both improper. Accordingly, we vacate the preliminary injunction and grant the OFCCP's motion for summary judgment.

VACATED AND REVERSED

APPENDIX B — EXCERPTS FROM TRANSCRIPT OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION DATED NOVEMBER 14, 1997 AND FILED DECEMBER 8, 1997

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

File No. 3:95CV103-MU

NATIONSBANK CORP., et al

Plaintiff,

vs.

ALEXIS HERMAN, SECRETARY OF LABOR, et al,

Defendant.

CORRECTED Transcript of proceedings before the Honorable GRAHAM C. MULLEN, United States District Court Judge, taken before Scott A. Huseby, Official Court Reporter and Notary Public, on the 14th day of November, 1997.

* * *

[58] THE COURT: We are going to take a break for a minute and I will be back out, and at that time the Court will rule from the bench on this matter and let you know what, if

any, additional scheduling needs to be done. And if y'all would, please, just take a break for a minute.

(Brief recess.)

THE COURT: All right, counsel, the basic issue at stake in this proceeding, and that includes the basic case that's been brought, is the existence, if any, and application of neutral selection criteria for OFCCP reviews of contractors.

Now, the — as to the mootness argument, the Court is not persuaded that the matter is moot. Withdrawing of notices for Tampa and Columbia does not deprive the Court of jurisdiction. The evidence from the bank indicates serious questions of whether OFCCP follows any plan, hence probable repetition of unconstitutional selections exists.

Now, the government wishes the Court to confine itself to an analysis that says that capable of repetition yet evading review is the standard. The Court declines to find that applicable in this case. The question is one of no reasonable expectation of reoccurrence and whether the interim acts eradicate the [59] effects.

The bank has provided evidence that there is no eradication whatsoever. The bank has clearly demonstrated lingering effects and group objections to bank acquisitions based on allegations of racial discrimination, and this in regard to a bank which is apparently 38 percent minority, has been awarded Eve awards, so that the lingering effects of designating Tampa and Columbia clearly continue. There are open questions regarding the continued acts of OFCCP, so the Court determines that mootness is not applicable.

Appendix B

As to the administrative exhaustion, the Volvo GM case seems to this court to be clearly distinguishable. APA claims are inextricably intertwined. Here, you have only Constitutional claims.

Now, the timing of all of this is very interesting to the Court. NationsBank comes to court to assert Constitutional issues and Constitutional protections. All of a sudden, two claims, two matters that OFCCP has cranked up and noticed out regarding Tampa and Columbia are all of a sudden dropped. And contemporaneously with the filing of the motion for summary judgment, the administrative action is filed. So this is highly intriguing as to why that might occur, and suggests efforts by DOL to avoid review whatsoever.

[60] Now, to the extent that this court has any discretion under the administrative exhaustion, the Court exercises its discretion to retain jurisdiction. And as far as the law is concerned, the Court notes that the administrative procedures in this highly fact-driven case are unlikely to be adequate. The position of the government would force the bank into litigation within an administrative agency, and the administrative law, yes, there could be a review, yes, the bank could assert that its Fourth Amendment Constitutional rights were traduced by the government, but it would be forced to make that within the context of an administrative law judge and administrative appeal where the Court would be highly deferential to the factual findings asserted or the factual findings made.

The factual finding may indeed be determinative of whether or not there's a Fourth Amendment right, is there a

plan, is it — you know, was it neutrally applied, what is going on here? All of that, if litigated within the context of the Administrative Procedures Act, puts the bank in a position where an independent determination of the Constitutional issues may not be adequate at the Department of Labor level.

So for all of those reasons, including the discretion of the Court, that motion for summary judgment [61] is denied. The Fourth Amendment is clearly applicable here. The OFCCP position appears to this court to be disingenuous. Each and every one of those notices clearly contemplates on site, and there is plenty, plenty factual disputes at issue here.

Now, as to the preliminary injunction, the bank is correct. The fact that they assert a Constitutional right to be free of illegal searches and seizures to be free of illegally seized evidence, the use of illegally seized evidence, is an overwhelming issue, and the harm to the government is negligible. This case is going to get tried in a hurry, and it's going to get decided in a hurry, and it's going to be decided before any hearing by the administrative law judge. Thus, the harm to the government is negligible.

Now, the Court recognizes that the government asserts, well, you will give a wrong signal to the contracting community, you can come to court and assert that your Constitutional rights are being violated, so come to court and get an injunction. I don't think it's that easy. This case is — any of these cases is highly fact specific.

On the other hand, if this court simply punts and says, go ahead with your administrative procedure, I likewise give

the government agency carte blanche to file [62] administrative complaints and oust the Court of jurisdiction. In that balance of harms test, then, the bank shows a considerable potential harm. I think the government's position on your reputational harm is correct, the reputational harm has occurred, it isn't going to get any better, it isn't going to get any worse whether the injunction is issued or not.

But as to the success on the merits because of the strong showing of irreparable harm by the bank, a somewhat lesser showing of success by NationsBank is indicated. Now, NationsBank shows considerable evidence of foreordained selection by the OFCCP with post hoc justification. I recognize that Mr. Adelstein vehemently opposes that, but there is a lot of evidence there that there is no criteria, no neutral criteria. The evidence on this test is strongly suggestive of no neutral criteria and the type of purely discretionary, i.e., arbitrary governmental action in selecting people, and therefore, there is more than a scintilla of evidence. I don't know whether I would characterize it as a strong showing of success on the merits, but it is certainly far more suggestive of success by NationsBank than not, and therefore, I think that element also goes in the bank's favor.

As to the public interest, it seems to me that [63] there are two public interests here, one which has not been articulated by the bank. I understand and agree with the public interest is very, very strong in requiring that governmental agencies conform their actions to the Constitution of the United States. Absent, absent that, we

might as well close the doors of this place and rely on someone from the government arriving to assist us whenever they wish to do so and for whatever reason. So this court is persuaded that the public interest is very, very strong into these inquiries.

There is another interest at stake here, and it is more subtle. It is that agencies which are responsible for enforcing equal employment opportunity laws must be held to conform their actions to the law, because arbitrary action by any such agencies over a very short run period of time will do nothing but destroy any public support of laws of that nature. And therefore, there are strong public policy implications and the Court grants the motion for a preliminary injunction and enjoins the Department from continuing with the proceeding.

This court will set this case for trial in the second half of February. If after I leave here and go plug in my computer the last week in February is [64] appropriate, i.e., open, that's the time that the Court is considering. Do either of you have any — that would be the week of February 23rd and continuing on into March 2nd if necessary. Do either of you have any scheduling conflicts that you know of today?

MR. KANE: No, sir.

MR. ADELSTEIN: No, sir.

THE COURT: Is there any additional discovery that either one of you needs to have done?

MR. PARSONS: No, sir. I would raise one other matter.

THE COURT: Yes, sir.

MR. PARSONS: The rule requires, Rule 65 requires that you ask us to post a bond.

THE COURT: $1,000 cash. Do so no later than 5:00 o'clock today. Mr. Adelstein, any reason why you can't be ready to go then, do you need any discovery?

MR. ADELSTEIN: I'm not certain at this juncture, Your Honor. I don't think so, but I would like to reserve the right.

THE COURT: All right. Counsel are reminded, Rule 26 remains in effect in this district. Swap your documents. I don't want any grief. To the extent that this is a document intensive case, I don't want any hoorah about the case. I don't want any game playing . . .

* * * *

APPENDIX C — ORDER OF DECISION AND INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION DATED NOVEMBER 14, 1997 AND FILED NOVEMBER 17, 1997

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. 3:95CV103-MU

NATIONSBANK CORPORATION, NATIONSBANK, N.A. (CAROLINAS), and NATIONSBANK OF FLORIDA, N.A.,

Plaintiffs,

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, **SHIRLEY WILCHER,** DEPUTY ASSISTANT SECRETARY FOR FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, **CAROL A. GAUDIN,** REGIONAL DIRECTOR OF OFFICE OF FEDERAL CONTRACT COMPLIANCE, REGION IV, **JEROME GEATHERS,** DISTRICT DIRECTOR FOR OFFICE OF FEDERAL CONTRACT COMPLIANCE, CHARLOTTE DISTRICT OFFICE, AND, **ALICE A. WEBSTER,** DISTRICT DIRECTOR FOR OFFICE OF FEDERAL CONTRACT COMPLIANCE, JACKSONVILLE DISTRICT OFFICE,

Defendants.

ORDER OF DECISION AND INJUNCTION

Appendix C

THIS MATTER is before the Court on Defendants' Motion for Summary Judgment, and Plaintiff's Motion for a Preliminary Injunction.

The Court held a hearing in this matter on November 14, 1997. For the reasons stated by the Court in that hearing, the Court denies Defendants' Motion for Summary Judgment. Additionally, for the reasons stated by the Court in the hearing on this matter, the Court grants Plaintiff's Motion for a Preliminary Injunction.

NOW, THEREFORE, IT IS ORDERED that Defendants' Motion for Summary Judgment be, and hereby is, **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for a Preliminary Injunction be, and hereby is, **GRANTED.** Effective immediately, Defendants are enjoined from continuing any and all proceedings regarding the Administrative Complaint filed by the Office of Federal Contract Compliance Programs, United States Department of Labor, Case No. 97-OFC-16, including, but not limited to, all discovery. All matters regarding Case No. 97-OFC-16 are hereby stayed until such time as this Court vacates this Order of Injunction. Plaintiff is directed to post a bond in the amount of $1,000.

IT IS FURTHER ORDERED that this case shall be set for trial to commence the week of February 16, 1998. The clerk is directed to serve copies of this Order upon all parties.

s/ Graham C. Mullen
Hon. Graham C. Mullen
United States District Court Judge

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 3, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1127
CA-95-103-3-MU

NATIONSBANK CORPORATION; NATIONSBANK, N.A.; NATIONSBANK OF FLORIDA, N.A.

Plaintiffs – Appellees

v.

ALEXIS M. HERMAN, Secretary of Labor, United States Department of Labor; SHIRLEY WILCHER, Deputy Assistant Secretary for Federal Contract Compliance Programs, United States Department of Labor, CAROL A. GAUDIN, Regional Director of Office of Federal Contract Compliance Region IV; JEROME GEATHERS, District Director for Office of Federal Contract Compliance, Charlotte District Office; ALICE A. WEBSTER, District Director for Office of Federal Contract Compliance, Jacksonville District Office; ALEXIS M. HERMAN, Secretary of Labor, United States Department of Labor

Defendants – Appellants

On Petition for Rehearing and Rehearing En Banc

Appendix D

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E — EXECUTIVE ORDER NO. 11246

Executive Order 11246

EQUAL EMPLOYMENT OPPORTUNITY

September 24, 1965

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I — NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

SEC. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

SEC. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian

employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

PART II — NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

SUBPART A — DUTIES OF THE SECRETARY OF LABOR

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and

shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B — CONTRACTORS' AGREEMENTS

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

> During the performance of this contract, the contractor agrees as follows:
>
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

Appendix E

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

Appendix E

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rule, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such

litigation to protect the interests of the United States.

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: Provided, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or

supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this

Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: Provided, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: And provided further, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued

pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other

interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federl agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D — SANCTIONS AND PENALTIES

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or

adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the non-discrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a)(5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Appendix E

SEC. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209(a)(6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART E — CERTIFICATES OF MERIT

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit

to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III — NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in

whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) 'Construction contract' as used in this Order means any contract for the construction, rehabilitation,

alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term 'applicant' as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the

failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: Provided, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

Appendix E

PART IV — MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the 'Plans for Progress.'

SEC. 403. (a) Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or

superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective thirty days after the date of this Order.

LYNDON B. JOHNSON
THE WHITE HOUSE,
September 24, 1965.

Supreme Court, U.S.
FILED
NOV 3 1999
OFFICE OF THE CLERK

No. 99-394

In the Supreme Court of the United States

BANK OF AMERICA CORPORATION, ET AL.,
PETITIONERS

v.

ALEXIS HERMAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal contractor must exhaust administrative remedies before initiating judicial proceedings that raise a constitutional challenge to agency action enforcing Executive Order No. 11,246.

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In the Supreme Court of the United States

No. 99-394

BANK OF AMERICA CORPORATION, ET AL.,
PETITIONERS

v.

ALEXIS HERMAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 174 F.3d 424. The district court's bench opinion (Pet. App. 14a-20a) and order granting petitioners' motion for preliminary injunction and denying respondents' motion for summary judgment (Pet. App. 21a-22a) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 6, 1999. A petition for rehearing was denied on June 3, 1999 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on September 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Executive Order No. 11,246, as amended, prohibits federal contractors from discriminating in employment on the basis of race, color, religion, sex, or national origin, and it requires federal contractors to take affirmative action to ensure that all qualified applicants and employees are treated on a nondiscriminatory basis. 3 C.F.R. 167 (Supp. 1965). Petitioner Bank of America[1] is a federal contractor subject to Executive Order No. 11,246. Pet. App. 3a.

The Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor is responsible for enforcing the Order. Among its other responsibilities, it conducts periodic compliance reviews to determine whether contractors are meeting their obligations. 41 C.F.R. 60-1.20. Subject to exemptions not applicable here, a contractor agrees to provide OFCCP with information and reports and to permit on-site access to its books and records so that OFCCP may determine whether the contractor is in compliance. 41 C.F.R. 60-1.43; Exec. Order No. 11,246, § 202(5). When OFCCP finds a violation, it must first seek to resolve the matter through conciliation. 41 C.F.R. 60-1.20(b). If conciliation fails, OFCCP may institute administrative enforcement proceedings within the Department of Labor. 41 C.F.R. 60-1.26(b)(2). The final administrative order is subject to federal judicial review. 5 U.S.C. 704; 41 C.F.R. 60-30.30.

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[1] As set forth in the petition (Pet. ii), the original plaintiffs were NationsBank Corporation, NationsBank, N.A., and NationsBank of Florida, N.A. As a result of various mergers, the reconstituted entities are Bank of America, N.A., and Bank of America Corporation, which are collectively referred to herein as "Bank of America" or "Bank."

2. In 1994, OFCCP conducted a compliance review of Bank of America's headquarters in Charlotte, North Carolina. Bank of America fully cooperated with this review, and it permitted inspection of documents and an onsite investigation. In October 1994, OFCCP notified Bank of America of its finding that the Bank had discriminated against minority applicants at its Charlotte facility in violation of the Executive Order. Pet. App. 3a. OFCCP's efforts at conciliation failed in March 1996. On the basis of its findings of discrimination, OFCCP subsequently referred the matter to the Solicitor of Labor, who filed an administrative complaint on July 18, 1997. *Id.* at 3a-4a.

In December 1994 and January 1995, OFCCP informed Bank of America that it had selected two of the Bank's other facilities in Tampa, Florida, and Columbia, South Carolina, for compliance reviews. The Bank, however, informed OFCCP that it would not cooperate with these reviews and would not provide information unless OFCCP notified it of the specific criteria OFCCP had used in selecting those facilities. Pet. App. 3a.

3. In March 1995, Bank of America sought declaratory and injunctive relief in the District Court for the Western District of North Carolina. It alleged that OFCCP's selection of its Tampa and Columbia facilities violated the Bank's Fourth Amendment rights on the theory that the selections were not based on specific neutral criteria or a reasonable administrative plan. See generally *United States* v. *Harris Methodist Ft. Worth*, 970 F.2d 94, 99-103 (5th Cir. 1992); *First Ala. Bank of Montgomery* v. *Donovan*, 692 F.2d 714 (11th Cir. 1982). In January 1996, the district court denied OFCCP's motion to dismiss for Bank of America's failure to exhaust administrative remedies. Pet. App. 4a. In April 1996, OFCCP notified Bank of America

that it was withdrawing the compliance review notices for the Tampa and Columbia facilities. *Ibid.*

In May 1997, Bank of America amended its complaint to allege, for the first time, that OFCCP's 1993 selection of the Bank's Charlotte headquarters for review also violated the Fourth Amendment. On July 21, 1997, the Department of Labor moved for summary judgment, arguing, *inter alia*, that, with respect to the Charlotte facility, Bank of America should be required to exhaust its administrative remedies in the pending administrative proceeding before obtaining judicial review. In September 1997, Bank of America filed a motion for a preliminary injunction to stay the administrative action pending a decision by the district court. Pet. App. 4a.

On November 14, 1997, the district court denied the government's motion for summary judgment and granted Bank of America's motion for a preliminary injunction. Pet. App. 4a, 14a-22a. The district court declined to require Bank of America to exhaust its administrative remedies with respect to the Charlotte facility. *Id.* at 16a-17a. The court's analysis focused on the fact that the Bank's complaint raised a constitutional claim and on the court's concerns about the motives and timing of OFCCP's actions. *Ibid.* The court raised doubts as to whether an administrative review would provide an "independent determination" of the constitutional issues and added that judicial review of the final administrative decision would be "inadequate" because the standard of review would be deferential to the agency's factual findings. *Ibid.*

4. The court of appeals reversed. It ruled that, under well-established precedent, a party must exhaust administrative remedies before challenging agency action pursuant to Executive Order No. 11,246, and it

further held that there was no waiver or exemption from exhaustion requirements for alleged constitutional violations. Pet. App. 7a-10a. The court also rejected petitioners' contention that OFCCP's supposedly "questionable behavior" warranted an exception to exhaustion of the Bank's administrative remedies. *Id.* at 11a. The court explained that "mere agency misbehavior does not justify waiver," and that one purpose of exhaustion is to allow agencies to correct their own mistakes prior to judicial review. *Id.* at 12a.

ARGUMENT

The court of appeals held that petitioners must exhaust administrative remedies before seeking federal court review of a constitutional challenge to a completed agency inspection. That holding is correct, and it does not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted.

1. It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Because of the important purposes served by the exhaustion requirement, waiver of that requirement is appropriate only in certain defined circumstances in which the individual's interest in immediate access to the federal courts outweighs the institutional interests in judicial efficiency and administrative autonomy. See *McCarthy* v. *Madigan*, 503 U.S. 140, 146-148 (1992).

The exhaustion rule is generally applicable to ordinary disputes concerning the enforcement of Executive Order No. 11,246, see *Volvo GM Heavy Truck Corp.* v. *United States Dep't of Labor*, 118 F.3d 205 (4th Cir.

1997), and petitioners do not appear to argue otherwise. Petitioners nonetheless contend (Pet. 7-8) that the exhaustion rule should not apply to them because their district court complaint presented *constitutional* claims. That contention is without merit. As the courts of appeals have consistently held, parties must first exhaust administrative remedies before seeking federal court review of a Fourth Amendment challenge to a completed agency search or inspection.[2] Those courts have correctly reasoned that the policies underlying the exhaustion rule—including the benefit of agency expertise to address matters raised, correct errors, and provide a complete record for judicial review, together with the interest in avoiding premature judicial resolution of constitutional claims—are best served by

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[2] See *In re Worksite Inspection of Quality Prods., Inc.*, 592 F.2d 611, 615 (1st Cir. 1979) (constitutional challenge to completed OSHA inspection must be addressed initially by administrative forum); *In re Gould Pub. Co.*, 934 F.2d 457, 459-461 (2d Cir. 1991) (same); *In re Establishment Inspection of Metal Bank of Am., Inc.*, 700 F.2d 910, 914-915 (3d Cir. 1983) (same); *Baldwin Metal Co.* v. *Donovan*, 642 F.2d 768, 777 (5th Cir.) (same), cert. denied, 454 U.S. 893 (1981); *In re Establishment Inspection of Manganas Painting Co.*, 104 F.3d 801, 802 (6th Cir. 1997) (same); *In re Establishment Inspection of Kohler Co.*, 935 F.2d 810, 812-814 (7th Cir. 1991) (same (and abandoning, in relevant part, previous position that had been in conflict with other circuits)); *Marshall* v. *Central Mine Equip. Co.*, 608 F.2d 719, 721-722 (8th Cir. 1979) (same); *In re J.R. Simplot Co.*, 640 F.2d 1134, 1137 (9th Cir. 1981) (same), cert. denied, 455 U.S. 939 (1982); *Robert K. Bell Enters., Inc.* v. *Donovan*, 710 F.2d 673, 674-675 (10th Cir. 1983) (same), cert. denied, 464 U.S. 1041 (1984); see also *Volvo GM Heavy Truck Corp.* v. *United States Dep't of Labor*, 118 F.3d 205 (4th Cir. 1997) (contractor's due process challenge to alleged delay in OFCCP complaint first must be presented to administrative forum).

requiring contractors to assert constitutional challenges initially in an appropriate administrative forum.[3]

Despite petitioners' suggestion to the contrary (Pet. 8), nothing in *McCarthy*, *supra*, or *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), supports any general exception to the exhaustion rule for constitutional claims. In *McCarthy*, the Court held that a prisoner who has filed a damages action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), need not first exhaust an administrative remedy procedure offered by the Bureau of Prisons. The Court ruled not that the exhaustion requirement is inapplicable to constitutional claims, but that, "given the type of claim [the prisoner] raises and the particular characteristics of the Bureau's general grievance procedure, [the prisoner's] individual interests outweigh countervailing institutional interests favoring exhaustion." 503 U.S. at 149. And, in *Patsy*, the issue was whether, and to what extent, Congress had intended to require parties to exhaust state administrative remedies before filing suit under 42 U.S.C. 1983; this Court's decision on that issue has little bearing on the application of exhaustion principles outside that statutory context.

2. Petitioners next suggest (Pet. 8-9) that the exhaustion rule is inapplicable where no administrative proceedings are pending at the time a party files its judicial complaint. As an initial matter, the court of appeals did not address that argument, which petitioners had not pressed in their merits brief, and this Court "do[es] not decide in the first instance issues not decided below." See *NCAA* v. *Smith*, 119 S. Ct. 924,

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[3] See, *e.g.*, *Gould*, 934 F.2d at 460; *Metal Bank*, 700 F.2d at 914-915.

930 (1999); see also *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996) (same).[4]

In any event, this Court and others have rejected the notion that plaintiffs can avoid the administrative process by filing a judicial action before formal administrative proceedings are initiated. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 216 (1994) (initiation of district court action cannot enjoin and avoid administrative process not yet initiated under Federal Mine Safety and Health Amendments Act of 1977); *Kohler Co.*, 935 F.2d at 812 (absence of formal administrative proceedings to raise Fourth Amendment challenge to completed OSHA inspection does not negate exhaustion requirement); *National Bank of Commerce* v. *Marshall*, 628 F.2d 474, 476, 478 (5th Cir. 1980) (federal contractor must exhaust administrative process even if judicial action challenging validity of Executive Order No. 11,246's implementing regulations is filed before a formal administrative complaint), cert. denied, 454 U.S. 1053 (1981). Carving out an exception to the exhaustion rule in such circumstances would thwart the basic policies underlying the rule, including the preservation of agency independence, the avoidance of piecemeal litigation, and the judicial interest in preventing pre-

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[4] Petitioners are in fact incorrect in asserting that administrative proceedings had not yet begun when they filed their amended complaint. While a formal administrative complaint had not yet been filed against Bank of America when the Bank amended its judicial complaint to challenge the completed search of the Charlotte headquarters, the administrative *process* had been underway for several years: OFCCP had given notice of intent to review the Charlotte facility in 1993; the search in issue was conducted in 1994; and lengthy but unsuccessful negotiations for a settlement lasted into 1996.

mature and perhaps unnecessary review of constitutional claims.

3. Finally, petitioners argue for an exemption from the exhaustion rule on the theory that any relief they could obtain in the administrative forum would be a "different and much lesser remedy" than the relief they have sought in the district court. Pet. 10. The court of appeals did not address that argument, however, because petitioners did not squarely present it below; for example, petitioners did not claim that exhaustion would be "futile" on the ground that money damages would be unavailable in the administrative proceedings. Petitioners' current argument is therefore not properly before this Court, as it was "not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); accord *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

In any event, petitioners are incorrect in asserting (Pet. 9) that "the only administrative 'remedy' available to Bank of America now that the OFCCP has commenced administrative proceedings is the possible exclusion of the unconstitutionally-obtained evidence from the administrative proceedings."[5] To the con-

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[5] Despite petitioners' contention (Pet. 9) that the only administrative remedy available is the possible exclusion of unconstitutionally obtained evidence, they themselves recently urged the administrative law judge reviewing this matter to "*dismiss* the * * * administrative action based on the OFCCP's unconstitutional selection and search of Bank of America's Charlotte head

trary, a final administrative ruling dismissing the action on Fourth Amendment grounds would have the same practical effect as the judicial relief that petitioners have specifically sought: a declaratory judgment that "the OFCCP violated [their] Fourth Amendment rights" (Pet. 10), and a court order "enjoin[ing] the OFCCP from doing so again" (*ibid.*). It is true that petitioners might be unable to obtain money damages or attorneys' fees in the administrative proceedings. See Pet. 10-11. But petitioners did not even specifically request that relief in their complaint, and the unavailability of such relief in the administrative setting could therefore provide no basis for an exemption from the exhaustion rule even if petitioners had preserved the issue in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1999

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quarters for an affirmative action compliance review." Motion for Summary Decision 1 (Sept. 8, 1999) (emphasis added).

As we observed below (see Gov't C.A. Br. 28 n.9), it is unclear whether an exclusionary remedy could be appropriate in non-criminal cases of this kind in any forum, including a judicial forum. See generally *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984).